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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Vantex Service Corporation

File: B-290415

Date: August 8, 2002

Simon Elliott for the protester.

Ronald A. Kennedy for Kennedy Septic Tank Service, the intervenor.

Parag J. Rawal, Esq., Department of the Army, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency's bundling of portable latrine rental services with waste removal services, each of which is classified under a different North American Industrial Classification System code and is generally performed by a different set of contractors, is sustained, where the agency has not shown that bundling the services is necessary to meet its needs.

DECISION

Vantex Service Corporation protests the terms of invitation for bids (IFB) No. DAKF40-02-B-0001, issued by the Department of the Army, Fort Bragg, North Carolina, for rental and servicing portable latrines at Fort Bragg, Fort Drum (New York), and Fort Campbell (Kentucky), and certain waste removal services at Fort Campbell. Vantex contends that the bundling of portable latrine rental and servicing with the other waste removal services at Fort Campbell unduly restricts competition.

We sustain the protest.

The IFB, issued as a total small business set-aside on March 29, 2002, contemplated the award of one or more fixed-price contracts for a base period with four 1-year options. The bidding schedule segregated the work for each facility under three separate schedules (I, II, III), and a fourth schedule (IV) that combined the work for all three facilities. The IFB permitted bidders to bid on a single schedule, a combination of schedules, or schedule IV (that is, all three locations), and provided for "most advantageous to the government" award(s), based on either the lowest bids from each schedule or the aggregate total of all schedules under schedule IV.

Schedule III (for Fort Campbell) included waste removal services in addition to portable latrine rental services; schedules I and II included only portable latrine rental services. The additional services under schedule III included pumping and cleaning grease traps; pumping and cleaning permanent concrete pit latrines; removing, cleaning and reinstalling sewer sump pumps; pumping and cleaning septic tanks; and pumping and cleaning sewer lift stations. It is the inclusion of these other services under schedule III that is the issue in this protest.

Vantex, which provides portable latrine services, filed a timely agency-level protest alleging that combining the portable latrine services with the waste removal services at Fort Campbell improperly bundled requirements in violation of the Competition in Contracting Act of 1984 (CICA). The Army denied Vantex's agency-level protest, and this protest on the same grounds was filed shortly before bid opening.

In response to the IFB, the Army received seven bids. Two bids were received in response to schedule III: one from the incumbent, Kennedy Septic Tank Service, Inc. at \$2,244,888 and the other from Tarheel Specialties at \$1,623,000.¹ Only Kennedy submitted a bid for the Army's total requirements for all three facilities under schedule IV.

CICA generally requires that solicitations include specifications which permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. See 10 U.S.C. § 2305(a)(1)(B) (2000). Because procurements conducted on a bundled or total package basis can restrict competition, we will sustain a challenge to the use of such an approach where it is not necessary to satisfy the agency's needs. Better Serv., B-265751.2, Jan. 18, 1996, 96-1 CPD ¶ 90 at 2.

Vantex argues that there is no valid reason to bundle the waste removal services and portable latrine rental services under schedule III. In this regard, Vantex notes that the two types of services combined at Fort Campbell fall under separate North American Industrial Classification System (NAICS) codes, and alleges that generally the bidders on solicitations covered by the NAICS code covering portable latrine services would not compete for the waste disposal services covered by the other NAICS code, and vice versa.² Vantex states that it is aware of no other military

¹ The government estimate for the total services at Fort Campbell was \$2,917,800. Vantex alleges that Tarheel lacks relevant experience and suggests that its low bid reflects a lack of understanding of the work, which, Vantex speculates, may lead the contracting officer to conclude that Tarheel is not a responsible bidder. Protester's Comments at 3. The agency states that it has not yet decided who should receive the award(s).

² The NAICS code is used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts.

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installation that bundles these services. Vantex further asserts that there has been very little competition (no more than two bids for the last several procurements) for these services since they have been combined. For example, in the prior solicitation for these services, there were only two bidders, itself and the incumbent, and Vantex found that it could not effectively compete because its expertise and equipment were only suited for the portable latrine requirement. Vantex asserts that bundling the requirements put Vantex and other potential bidders (both portable latrine service providers and waste removal service providers), who could not provide all of the services, at such a competitive disadvantage that only the incumbent (which provides both types of services) would be competitive.

The Army's stated reason for combining portable latrine services with waste removal services at Fort Campbell is as follows:

In the early 1980's, Fort Campbell obtained grease trap cleaning services via purchase orders. Cleaning services for Government owned portable latrines was also contracted out. This method of acquiring services was costly, inefficient, and an administrative burden. In the mid-1980's, Fort Campbell, therefore, sought to have one contractor perform all the liquid waste removal services as it was natural to combine like type contracts. This method of acquiring services was cost efficient and reduced our administrative burden. We were able to avoid multiple solicitations and multiple contracts with multiple contractors. As a result Fort Campbell could obtain needed similar services utilizing one contracting officer, one contract specialist, and one contracting officer's representative.

Agency Report, Tab 15, Statement of Fort Campbell's Contracting Officer, at 2-3. In addition, the agency states that the types of equipment and employees that would be used for the two types of services are very similar and that no particular expertise or certification is required for the waste removal services. Id.; Tab 16, Statement of Chief Engineering Division, Public Works Business Center, Fort Campbell.

On the record before us, we find that the Army has not adequately demonstrated that combining its requirements for portable latrine and waste removal services was

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See Professional Landscape Mgmt. Servs., Inc.-Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at 2 n.3. Here, since the portable latrine services represented 75 percent of the Army's Fort Campbell requirement, the Army solicited the requirement under the NAICS code pertaining to portable latrine rental and servicing. Response to Agency-Level Protest at 1.

necessary to satisfy the agency's needs.³ The agency has not adequately explained why it chose to bundle the two kinds of work at Fort Campbell, yet did not bundle two kinds of work at either of the other two locations, and in fact structured the solicitation so that services for the three locations can be obtained by separate or combined awards, thus facilitating competition while not excluding the possibility of a combined contract.

The agency's justification, quoted above, essentially amounts to reliance on administrative convenience as the basis for the bundling. However, the fact that the agency may find that combining the requirements is more convenient administratively, in that it has found dealing with one contract and contractor less burdensome, is not a legal basis to justify combining the requirements, if the combining of requirements restricts competition. CICA and its implementing regulations require that the scales be tipped in favor of ensuring full and open competition, whenever concerns of economy or efficiency are being weighed against ensuring full and open competition. See Better Serv., supra; National Customer Eng'g, B-251135, Mar. 11, 93-1 CPD ¶ 225 at 6.

Although the Army also claims that combining the services was more cost efficient, other than its own statement, it has not produced any evidence showing that these cost savings were significant, nor has it explained why these savings went beyond no longer having to administer more than one contract. Restricting competition is presumed to raise, not lower, the cost that the government will pay, and the desire to reduce administrative costs is generally neither a permissible nor a logical basis to restrict competition. See National Customer Eng'g, supra, at 6-7 (where an agency concludes that having separate contractors may lead to additional costs, the proper course is not to restrict competition, but rather to structure the procurement to take all costs into account).

Here, the record does not evidence that the agency has received the benefit of competition or a lower price by combining the services. The Army's reported receipt of at least two bids under each procurement since the services have been combined, and the recent experience in the last two procurements reveal that the Army has only received minimal competition. The Army mistakenly argues that receipt of at least two bids constitutes adequate competition citing FAR § 19.502-2. That section, however, establishes only the criteria upon which the agency may base a decision to set aside a procurement exclusively for small businesses. On the other hand, FAR § 14.408-1(b) states:

³ After the protester's comments were filed, we requested during a conference call with the parties whether the agency had any additional reasons for combining the requirements. The agency provided no further reasons in response to this request.

[I]f less than three bids have been received, the contracting officer shall examine the situation to ascertain the reasons for the small number of responses. Award shall be made notwithstanding the limited number of bids. However, the contracting officer shall initiate, if appropriate, corrective action to increase competition in future solicitations for the same or similar items, and include a notation of such action in the records of the invitation for bids.

Even though no more than two bids were apparently received on prior procurements for the combined services, there is no evidence that the contracting officer undertook any investigation to determine whether combining the requirements was inhibiting competition.

Moreover, the Army's own market survey confirmed that there were "numerous" businesses capable of competing (and apparently willing to compete) for the waste removal services, but chose not to compete primarily because of the way in which the agency combined portable latrine services with these other services that represented only approximately 25 percent of the contract. See Agency Report, Tab 15, Statement of Fort Campbell's Contracting Officer at 1; Agency Legal Memorandum at 4, 7-8. As pointed out by the protester, this survey did not include portable latrine companies in the area; Vantex's own survey revealed at least 31 companies in the area who provide portable latrine services, at least one of which had previously expressed interest in bidding but did or could not because the services were combined with waste disposal services at Fort Campbell. See Protester's Comments at 2. That is, the record before us indicates that different sets of contractors perform the two types of work and that bundling the two types of work appears to discourage competition. Given the lack of competition, and evidence that other companies likely would have bid had the agency not bundled the services, we believe that there is a reasonable basis for concern that the bundling of services here may be causing the agency to pay unnecessarily high prices.

The agency has produced evidence that a contractor could use some of the same trucks, expertise, and equipment necessary to service the portable latrines to perform the other services and that these other services require no particular expertise or certification.⁴ The agency also argues that Vantex and other bidders could easily subcontract for these services. These arguments are not relevant here because the issue is not whether there are any potential offerors who can surmount barriers to competition, but rather whether the barriers themselves--in this case, the bundling--are required to meet the government's needs. Pemco Aeroplex, Inc., B-280397, Sept. 25, 1998, 98-2 CPD ¶ 79 at 15; National Customer Eng'g, supra, at 5.

⁴ The protester responds that the agency and Kennedy's assertions that the same equipment can be used do not account for various environmental requirements, an argument that the agency has not addressed.

As discussed above, the Army has not shown that combining portable latrine rental and services with the other waste removal services is necessary to meet the agency's needs.

The protest is sustained.

We recommend that the Army resolicit its requirements for Fort Campbell without bundling portable latrine services with the other waste removal services. The agency could accomplish this by amending the solicitation to provide for the possibility of separate awards for the two types of services at Fort Campbell, as it did with regard to the possibility of separate awards for the work at the three installations. We also recommend that the protester be reimbursed the cost of filing and pursuing its protests, including attorney's fees. The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

Anthony H. Gamboa
General Counsel